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The Texas Community System

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T H E S I S .

The Texas Community System

by

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THE TEXAS COMMUNIO BONORUM

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THESIS.

"The Texas Community System".

EARLY TEXAS HISTORY.

By the Constitutive act of 1824 the Mexican states of Coahuila and Texas were united. Gradually disaffection arose between the people of the two states, and in October, 1834 two meetings were held in the state of Texas, one at San Antonio, and the second at San Felipe de Austin. The former (a convention), was held for the purpose of organizing the people of Texas for the protection of their rights, and at the second meeting a resolution was passed recommending that the connection between Coahuila and Texas be dissolved.

Murmurings of discontent were now continually heard, and disaffection with the existing government gradually increased. At last a revolutionary convention was called, and on November 7th, 1835 a declaration was made "refusing to acknowledge the rights of the existing authorities of the Mexican Government within the limits of Texas".

The Plan and Powers of the Provisional Government of Texas was adopted November 13th, 1835. On March 2nd, 1836, in a general convention of delegates of the people of Texas, a formal declaration of independence was made.

The constitution of the Republic of Texas was adopted in the same convention on March 16th, 1836, and was ratified by the people on the first Monday in September, 1836. By this constitution it was provided: Congress, (Legislature of Texas), shall as early as practicable introduce by statute, the common law of England, with such modifications as our circumstances, in their judgment may require; and in all criminal cases the common law shall be the rule of decision. (Art. IV, sec. 13)

(By the Act of Congress Dec. 20, 1836, the common law of England, so far as it applied to juries and evidence, was adopted).

(By Act of Congress, Dec. 20, 1840, the common law of England, so far as not inconsistent with the constitution and the acts of Congress, (of Texas), then in force, was made the rule of decision.)

On Dec. 29th, 1845, Texas was admitted into the Union, in anticipation of which she in the same year had adopted a new constitution conforming to the change in the form of government.

Such is a brief synopsis of the constitutional history of a state whose system of marital relations I am about to discuss.

Origin of the Community System.

At a very early period of the world's history we find the poor downtrodden classes gradually uniting to form associations. They thus improved and developed their condition of life, and in the words of Jafferriero, "such association made them live and grow for better times".

These associations expanded into what is now known as the Ancient Community, which according to M. Dupin, "formed a sort of corporation or college--a civil person, like a monastery or borough, which is perpetual by the substitution of new constituent members, without any change in the actual existence of the corporation, either in its manner of life or in the government of its own affairs".

on
Passing_A by rapid strides we soon reach the family community, which was the logical successor of the village community. Such a community was an association for common defense and according to Laveleye, cultivated its domain for the common profit and lived at the common expense. The right of inheritance was based not upon ties of blood but upon the life in common, and only applied to relations living in community, whether collaterals or even strangers admitted by adoption.

"The association of all the members of the family under

one roof, on one property, with a view to joint labor and joint profits", says M. Troplong, "is a general and characteristic fact from the South of France to its opposite extremities". (Commentaries sur les sociétés civiles, Préface) Females were excluded from the inheritance of family communities in Slavonic countries, in India, pagan Greece and Rome, and even in countries within the pale of Christianity. Why this exclusion? M. Fustel de Coulanges gives as a reason, the incapacity of females to perform the sacrifices. A better reason given is that the patrimony of these families, from which they derived their support, had to be preserved intact. Females by marriage passed into another family, and if they were allowed to inherit they would claim their share, and the destruction of the family corporation would thus be inevitable. In other words, they were excluded from inheriting in order to preserve the gens, and the indivisibility of the family property. Such was the family community in its primitive state, but "tempores mutantur nos mutamur in illis".

In the family community we have, to my mind, the germ of the system of acquêts and gains. We see in that the idea of forming a primitive family, in which all the members are proprietors, all co-equals in the cultivation of the land, and all share alike in the profits. The essential element of the present community system is, of course, wanting. The wife was not a sharer of the

profits. The reason for this has been explained above. How, then, was this essential element engrafted upon this primitive system? My only presumption in regard to this is, that in those countries where the system originated the wife's position gradually became of greater importance until at last she was recognized as of equal importance to the husband. When this idea began to prevail, family communities dissolved into families, and the wife's position being thus elevated, the inevitable conclusion must have followed that the wife, by her industry and care, contributes equally with her husband to the acquisition of property. Why then should she not share in the benefits?

Several Spanish writers cling to the idea that the Community system originated with the Romans. This, I believe, is entirely erroneous, for nowhere and at no period of the Roman law can we find a trace of this system or anything similar thereto. At an early period of the Roman law the wife's position was regulated by the "Manus". She fell under "the hand" of her husband, and virtually became a mere member of his family. On the death of a patrician pater-familias the children inherited, his widow taking an equal share with them.

From this extremely humble position the Roman law elevated the wife to its exact opposite. At this later period the

Roman marriage left the spouses almost entirely independent of each other. They had separate rights, and could each hold separate and distinct estates. Under this system of the civil law the wife only inherited after the husband's kith and kin had been exhausted and even then she only took in preference to the treasury.

The only way then by which the community system could have existed under the civil law was by a stipulation to that effect in the ante-nuptial contract between the parties, for, in the more polished ages of Roman jurisprudence, the wife being looked upon as a separate and distinct person from the husband, could stipulate with him any agreement which was to guide their marital relations.

All the French writers are agreed that the system never originated with the Roman law. They undoubtedly arrive at this conclusion by noting that before the French Revolution, in the Southern provinces where the Roman law prevailed, the marriage contract was governed by the dotal system, whereas in the Northern provinces which were under the customary law, the community of property governed the marital contract.[#] The French Code gave the preference to the latter system, for while it allowed the

1. 2 Kent Comm. 190.

contracting parties to elect between the Régime dotal and the Régime de la Communauté, yet if no choice was made, the latter system prevailed.

Sir Henry Maine in his work on "Ancient Law" says: "With the early Romans, as with the Hindus and the Greeks, marriage was a religious duty. A duty a man owed alike to his ancestors and himself." This appears to me to be another reason why the early state of the Civil law could never have originated the community system, for marriage by this system is and always has been a mere life partnership between man and woman for the common benefit of both.

The later dotal system, it can readily be seen, bears not the slightest resemblance to the system of acquêts and gains. From the foregoing premises the conclusion therefore must follow, that the Communio bonorum was never a part of the Roman law. If it was a part of that law, it existed at an extremely early period, and ceased long before the compilation of the Digest.

Under the Common law the wife's existence is merged in that of the husband. In other words, "the husband and wife are one, and that one is the husband." The wife is therefore not an equal of the husband. The community system could therefore never have originated with the Common law.

Whence then did it come? In those countries where this

system prevailed, it was so ancient that no one has as yet been able to say whence it came, when it commenced, or how it was introduced. Even as the community system is midway between that of the common law, and its opposite the civil law, so the origin of that system is only to be traced to a country midway between the original countries of the Common and of the Civil law. After careful reading and study I have come to the conclusion that only one presumption is to be entertained and that is, that the community system is an outgrowth of the customary law of the Germanic tribes. Caesar in his commentaries says that when the Gauls married, the husband was held to put in common as much property as he received from his wife; to make of the whole a mass, which should belong to the survivor of the two. While this is not the community system, it undoubtedly embraces some of its ideas.

Troplong in his preface to his work "Du Contrat de Mariage" says XCVII : "It seems now to be the system of the countries governed by the customary law. The invasion of the Franks had penetrated in a most profound manner the countries conquered by the Visigoths and the Burgundians. Numerous bands of the French had occupied the soil, in great part deserted. They created establishments in these countries, built fortifications, constructed villages, and the Germanic element had energetically preserved its

originality in the presence of the indigenous population, much rarer than in the South" (Free translation).

At a very early period of the history of the Germans we find that the wife took by positive law the one-third ($1/3$), of all the gains made during coverture. The care and industry of the wife undoubtedly produced this legislation, but in this as in many other notable instances, "the legislation survives long after causes which occasioned it, have ceased to exist."

However the system originated, we find that it prevailed at a very early period in France, Spain, Holland and Scotland, and was carried by colonists to Ceylon, Mauritius, the Cape of Good Hope, Guiana, Demarara and Canada. It was established by Spanish colonists in La. and Mexico, and now exists, in a more or less modified form, in the states of La. Tex. Cal. Nev. Washington, Montana, Idaho, Arizona, Dak., Mo., and the territories of New Mexico and Utah.

The system as it exists in Scotland, is of a very limited character, and does not extend to real property or subjects which produce annual profits. The French law extends the system merely to personality, while in Spain, both real and personal property are subject to it. The Community system, it can be readily seen, is widely prevalent, but I shall now confine myself to the system as it exists in Texas.

LEGISLATION ON THE SUBJECT.

In Schedule Sec. 1 of the Constitution of the Republic of Texas, (1836) we find the following: That no inconvenience may arise from the adoption of this constitution, it is declared by this Convention that all laws now in force in Texas, and not inconsistent with this Constitution, shall remain in full force, until declared void, repealed, altered, or expire by their own limitation.

The Constitution of the State of Texas (1845), Art. VII, Sec. 19 provides: "All property both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property". This same provision is found in the Constitution of 1861 (Art. VII sec. 19), in the Constitution of 1866 (Art. VII sec. 19), and in the last Constitution of 1876 (Art. XVI sec. 15). The provision in the Constitution of 1869 (Art. XVII, sec. 14) is substantially the same but worded slightly different. Such is the only constitutional provision to be found on the subject.

COMMUNITY PROPERTY UNDER THE SPANISH SYSTEM.

Before the adoption of the common law the marital rights in Texas, were regulated and determined by the laws of Spain.

What then was community property under that system?

"Sanancial property is all that which is increased or multiplied during marriage; by multiplied, being understood all that which is increased by onerous cause or title, and not by a herative one, as inheritance or donation; that property is supposed to be common except when proved to be separate or distinct; that what the husband or wife bring into marriage as their own peculiar property, or acquire ^{during} it by lucrative cause or title, does not come into partition; but that property acquired during marriage by purchase, sale, or other onerous cause or title does". (White's Recopilacion, vol. 1 p. 61).

In the Novissima Recop. (lib. 10 tit. 4 sec. 1) we find the following law: "Everything which the husband or wife shall acquire or purchase while together, shall be equally divided between them" etc.##

There is thus a strong presumption that all property ac-

1. (Toda cosa que el marido y muger ganaren a compraon estando de consumo hay aulo ambos per medio etc).

quired during the existence of the community belongs to it. This presumption can only be overcome by certain and positive evidence, and the burden of proof is thus always on the party claiming the property as separate.

In Sala lib. 1 tit. 4 sec. 20, it is clearly laid down that, "during the continuance of the marriage the actual dominion over the community property is vested in the husband, and that therefore he can sell the community property without the consent of the wife; and that such disposition is valid, except when made for the purpose of defrauding or prejudicing the wife" (See White's Recop. vol. 1 p. 63 with the note from Palacios) Such were the essential provisions of the Spanish Community system.

On January 20th, 1840, when the common law was adopted by the state of Texas, an act was passed "defining the marital rights of husband and wife". By this act the Spanish system was substantially re-enacted on the Statute book of the new American state of Texas. In 1848 an act was passed, "better defining the marital rights". There were but few changes made in the Spanish law, one of the most important being that the wife could now become liable as surety for her husband. The substantial provisions of these two acts, and the substance of the leading cases construing their provisions will constitute the basis of my further remarks.

THE TEXAS COMMUNITIO BONOPUM.

I. The Partnership Relation.

The relation which exists between husband and wife under this system is virtually a partnership by which they agree to combine their property, labor and skill, and share alike in the profits. The only property that is not primarily liable for partnership debts is that acquired by either party by gift, devise or descent, such property being the separate property of either spouse.

A. THE HUSBAND'S INTEREST.

The husband, under this system, as under all systems of marital relations, is the head of the family, and as such head ^{are} certain rights and privileges ^A allowed him with respect to the community property. These are as follows:

- (1) He has the active dominion and control over the community property.
- (2) He can alienate, exchange or dispose of it without the consent of his matrimonial partner; and his acts, if not done with a fraudulent intent to her injury, will be good.
- (3) He sells and purchases in his own name.
- (4) He may encumber all real estate of the community except the homestead (Mabry v. Harrison, 44 Tex. 286.)

(c) # Conveyances as a rule, are taken in his name but they may be taken in the joint name of himself and wife, or in her name alone.

"No doctrine is better settled", says Ch. J. Wheeler in *Mitchell v. Marr* 26 T., 330, "than that property purchased during a marriage, whether the conveyance be taken in the name of the husband or of the wife, or in the joint names of both prima facie belongs to the community".

This presumption may, however, be rebutted: (a) By clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife, in which case it remains the separate property of the party whose money was employed in its acquisition#. (b) By proof that the husband declared at the time that his intention in taking the deed in his wife's name was to make the land her separate property. In such cases the transaction operates as a gift from the husband to the wife. Thus it was held in *Hartwell v. Jackson* 7 T. 576, that the husband may make a valid bill of sale or deed of gift to his wife, which will be enforced against his heirs.

It seems that in order to rebut the presumption that

1. ^{See} *Higgins v. Johnson's heirs*, 20 Tex. 389.
 Smith v. Strahan, 16 T. 314.
2. *Huston v. Curl*, 8 T. 239.

property purchased during marriage is community property, where a creditor is concerned, one of three things must be shown: (1) that the funds with which the purchase was made were owned by the claimant before the marriage, or, (2) were acquired by gift, devise or descent, or (3) that said funds were the proceeds of property thus owned or acquired.

B. THE WIFE'S INTEREST.

The wife's interest in the community property is held in privity with the husband. The power of the husband over the community estate by estoppel is not less than that of a partner to estop his firm#.

The wife loses many of her civil rights by marriage. "The law", says Ch. J. Hemphill in *Edrington v. Mayfield*, 5 T. 363, "has deemed it sound policy and beneficial to her interests that certain onerous restrictions should be imposed upon her ability to deal with her separate estate. And if it be shielded from her voluntary dispositions a fortiori it would be protected against the debts, engagements or contracts of her husband, unless made for the benefit of such estates or, under certain circumstances, for the support of the wife and her family."

1. *Ranney v. Miller*, 51 T. 263.

The disabilities under which the wife is placed are:

- (1) She is divested of power of free disposition of her own property, unless joined in the conveyance by her husband, and acknowledged before an officer that it was made with her consent.
- (2) Her separate property is entirely under the husband's management and he also has power to dispose of the common stock of gains.
- (3) Generally she has no power to contract or be bound by contracts, unless as the agent or through the assent of the husband. (Contracts for necessities for herself and children, and ^{for} the benefit of her separate property are excepted from this rule.)
- (4) She cannot sue for her own effects, unless joined with her husband, or on his failure, under the authority of the court. #

When the matrimonial union has continued for any considerable period, the presumption is strong that the property belongs to the common stock of acquêts and gains. There is therefore no presumption that property in the possession of a conjugal partnership belongs to the husband rather than to the wife. #

In the case of *Hodge v. Donald* 55 T 345, the court says: The rule deducible from former decisions by which it is determined whether a grant of land issued to a colonist was separate or community property is as follows: (1) If the surviving husband re-

1. *Wright v. Hays* 10 T 130.
2. 5 T 363 *Edrington v. Mayfield*.

ceived the grant by reason of such emigration, settlement and residence on his part as would under the law entitle him to it independent of his status as a married man at the date of his wife's death, it was his separate property. (2) If the increased quantity of land over that to which a single man not the head of a family was entitled, was given to the surviving husband by reason of the fact that at the date of the death of the wife he was then a married man, then it was community property, and the half interest of the wife subject to the debts of the community would descend to her children.

2. Agent of Partnership.

A. HUSBAND AS AGENT.

The powers of the husband over the separate property of the wife are somewhat similar to those vested in the husband under the rules of equity jurisprudence, when permitted and authorized by his wife, to receive the rents, issues and profits of estates limited to her sole and separate use.

The husband may therefore be her agent to make contracts that will bind her separate estate, but it is not to be presumed that he is her agent because he is her husband. The agency must be such in fact, and not a thing to be presumed because of the

relation of husband and wife.[#] Thus in the case of Furrh v. Winston 66 T 521 the court held, where a husband makes improvements on his wife's lands with community funds he is entitled to reimbursement to the share of the funds used.

Where community property is assigned by the husband in the name of the wife, he is the real contracting party, though he assumes to act merely as her agent.[#] Under the colonization laws of Mexico, Coahuila and Texas a married woman was capable of receiving a concession of land by onerous title. Such a grant however was looked upon as community property and the husband could dispose of it in any mode not intended to defraud the wife.

B. WIFE AS AGENT.

The relationship between husband and wife is such that she is often called upon to act as his impliedly authorized agent, even in the management of his own affairs; more especially may she manage and control her separate property during his absence.

The wife, however, to dispose of the community property must have the assent either express or implied of the husband. Thus in the case of Thomas v. Chance 11 T 634, where certain community real estate had stood in the name of the wife, and there was a deed from the wife alone, the husband having secured the

1. Magee v. White 23 T 180.
2. 77 T 326.

purchase money, the court held, that the sale was as valid as if the deed had been made by the husband. A deed, made by a married woman, of the community property, without the concurrence of her husband is entirely worthless. In *Young v. Van Benthuyssen* 30 T. 763, the court says; a deed made by a married woman for land, even if the land had been her own, would not have passed the title unless it were acknowledged before a proper officer, according to the statute in such cases made and provided.

3. LIABILITY OF PARTNERS.

The commentators upon the laws of Spain announce the proposition that the community property of the husband and wife is chargeable with community debts, and the separate property of each with their respective separate debts; and no doubt where there was both common and separate property, and common and separate debts, the community property would be chargeable with the community debts and the separate estate with the separate debts.

But the court in *Portis V. Parker* 22 T. 699 says: We are not satisfied that the community property was not liable by the laws of Spain, for the separate debts of the husband, where he had no separate estate, inasmuch as we have not had an opportunity sufficiently to explore it to ascertain satisfactorily its provisions.

Owing to lack of material I have been unable to verify the correctness of the above statement.

Community property is subject to the separate debts of the husband, says the court in *Lee v. Henderson*, 70 T. 190, under the old law of Texas relating to husband and wife, which is substantially re-enacted by Rev. Stat. Tex. tit. 50. As a general rule, it may be stated that the private property of each partner in the matrimonial union must bear its own charges and expenses.

The surviving husband is personally liable for all community debts, and hence if he extinguishes the community interest in any given article of property, the property still continues liable to community creditors. The surviving wife is not personally liable for community debts, and hence whenever she extinguishes the community interest in any given article of property, that property becomes absolutely hers.[#]

In *Taylor v. Murphy*, 50 T. 291, the court held that community property responds for a wife's antenuptial debts after her separate property has been exhausted.

4. NECESSARIES.

The law imposes upon a husband the obligation to support

1. *Leatherwood v. Arnold*, 66 T. 414sc 1 SW 173.

his wife and children. If there is no community property but the husband has separate property, such property can then be charged for necessities for the support of his family.

"The law permits", says Judge Bell, in *Magee v. White* 23 T. 180, "the wife to contract for necessities for herself and children and to incur expenses for the benefit of her separate property; and her separate property is bound for such necessities and such expenses. But she is under no legal obligation to support the husband, nor can her separate estate be charged even for necessities for him, notwithstanding he may be insolvent".

In order to charge the separate property of the wife, on general principles of equity, for necessities for the family, in addition to the insolvency of the husband it must be alleged and shown that the rents, profits, and hire of the separate property are insufficient to discharge the demand. The corpus of the separate property of the wife should not be sacrificed except in case of absolute necessity#

The expense occasioned by the wife's necessities should be satisfied:

First, out of the common property.

Secondly, out of the separate property of the husband

1. *Brown v. Fctor*, 19 T. 347.

Thirdly, out of the rents and profits of the wife's separate property.

Fourthly, out of the corpus of the wife's separate property.

If a separation takes place between husband and wife, without the fault of the latter, the husband will of course be liable for necessities furnished her, and his express prohibition not to furnish her with certain articles is entitled to little or no weight.

It appears further that the wife would be entitled in many instances, to necessities, although the separation may have been by her fault; as, for instance, where her separate property is under her husband's control, or there is a sufficient amount of community property.

If necessities are supplied on the credit of the wife and she has separate property and means wherewith to pay the claim, and this separate property is under her own control, with an income amply sufficient to the supply of her wants, it would seem that such debt could be satisfied out of the wife's separate property¹.

1. Black v. Bryan, 18 T. 453.

5. DISSOLUTION OF THE PARTNERSHIP.

The conjugal partnership may be dissolved in four ways:

- (1) Death, natural or civil; (2) Divorce; (3) Separation of body;
- (4) Separation of property.

(1) Death.

The existence of the wife is not merged in that of the husband. They are separate and distinct persons, especially as regards their estates and rights of property. "They are co-equals in life and at death, the survivor, whether husband or wife, remains the head of the family."[#]

The survivor can sell his or her undivided interest in the community property, but if there are any children, such survivor cannot sell the interest of the deceased partner, except to pay the community debts and the existence of such debts will not be presumed. The husband as survivor of the connubial partnership has authority to fulfil all contracts, respecting the common property, entered into by himself alone or jointly with the wife before her death.[#]

At the death of the husband the surviving wife has the right to retain the homestead and other property which is exempted from forced sale. This homestead right of the wife does not how-

1. Wood v. Wheeler 7 T 13.
2. Brewer v. Wall 23 T 585.

ever survive at her death, so as to vest a similar right in the children of the marriage, and if it be the husband's separate property he may sell it.

2. DIVORCE.

The court pronouncing a decree of divorce from the bond of matrimony shall also decree and order a division of the estate of the parties in such way as to the court shall seem just and right, having due regard to the rights of each party, and their children if any; provided however, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to real estate[#].

As a general rule, says the learned judge in Pitts v. Pitts 14 T. 443, the separate property should be restored to its owner, and such division of the community property may be made as may seem just and right, having reference to the education and maintenance of the children. But in a proper case the separate property may be placed in the hands of a trustee, and its rents etc. paid to the husband, wife and children in such proportion as the court may direct.

Where the circumstances require it the community property may also be placed in the hands of a trustee.

1. Sayle's Civil Stat. of Texas, Art. 2864.

On the dissolution of marriage by divorce, community property must satisfy community debts incurred before the institution of the divorce suit[#].

On and after the day on which the action for divorce shall be brought, it shall not be lawful for the husband to contract any debts on account of the community, nor to dispose of the lands belonging to the same; and any alienation made by him after that time shall be null and void, if it be proved to the satisfaction of the court that such alienation was made with a fraudulent view of injuring the rights of the wife[#].

3. SEPARATION OF BODY.

The only difference between the rights of the husband and wife in respect to property acquired during coverture is, that he has the management and control of it for the benefit of both. In all other respects their rights are precisely equivalent.

Where the husband is absent from home, and leaves no one to take care of the common property, the wife acquires a right, rather, has the implied authority to manage, control and dispose of the community property, as well as her separate property[#].

1. Richey v. Hearn 41 T. 336.
2. Sayle's Civil Stats. Tex. Art. 2867.
3. Cheek v. Bellows, 17 T. 613.

"Her passive rights are quickened into vigorous activity by the desertion of her husband". All her rights in and to the community property are made the same as if he were dead[#].

This authority given to the wife is based on sound reason and equity, and it is oftentimes necessary for the preservation of the community property and the support of the wife and children. When the wife makes contracts under such circumstances as give her this implied authority, a privy examination is not essential to give them effect. She may prove and acknowledge them in the same manner as those of a feme sole.

It has been held that the period of abandonment is not material except in evidence, to show that the absence is not temporary in its nature.

If the husband becomes insane, his wife becomes the head of the family, and has a perfect legal right to dispose of so much of the community property, or if there is none, then so much of the husband's separate property as may be necessary to the support of herself and children. She is liable, however, on the husband's recovering his faculties, for all property that has been unnecessarily squandered[#].

1. Cullers v. James, 66 T. 494.
2. Forbes v. Moore, 32 T. 196.

Where the wife without good cause voluntarily abandoned her husband for several years, the court in Farle v. Farle 9 T. 630 held that she forfeited her claim to the homestead and widow's allowance.

6. SEPARATE PROPERTY OF THE WIFE.

All property, both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterward by gift, devise or descent, as also the increase of all lands thus acquired shall be his separate property. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife; but during the marriage the husband shall have the sole management of all such property[#].

The capacity of the wife to hold property in her own right, separate and apart from her husband is as complete and perfect as that of the husband to hold property in his own right, separate and apart from his wife. There is not the slightest difference in this particular between their civil rights and capacities.

1. Sayle's Civ. Stat. of Tex., Art. 2851.

"The principles and rules of the common law", says the learned judge, in *Edrington v. Mayfield*, 5 T. 363, "as to the effect of coverture, so far as the^y affect the capacity of the wife to hold property in her separate right, are totally expunged from our code of jurisprudence and in an investigation of the rights of the wife must be altogether discarded from consideration".

The statutory estate granted to a wife by our laws, is also entirely different from the equitable estate limited to the sole and separate use of married women in England, for the very object of this latter system is to prevent the husband from controlling and managing the estate.

Our laws, on the contrary, give to the husband the sole management and entire proceeds of the wife's separate estate during the marriage. He, however, is compelled to support the wife and children, and on his failing to do this the wife may complain to the court, whereupon it is in the power of the court to decree that so much of such proceeds shall be paid to the wife as the court deems necessary. The court, therefore, even when applied to, only takes control of so much of the proceeds, of the wife's separate property as the necessities of the case may require.

Under the laws of Spain, in force in Texas prior to the year 1840, the wife, notwithstanding her separate estate, could not

exercise many civil rights. As a general proposition, she could not make contracts, without the consent of her husband, and she was especially prohibited from becoming his security. "This disability to become security, with certain exceptions not necessary to be noticed", says Febero (vol. 2 pp. 422, 622), "was an immunity common to the sex and applicable to feme sole as well as ^{to} married women¹".

The Act of 1840, however, has added considerable to the civil rights of the wife, and by augmenting the amount of community property, has diminished the amount belonging to the parties in their separate rights.

"Even where the forms of law are all complied with", says Judge Hemphill in Hollis v. Francois, 5 T. 195, "the courts will examine with vigilance transactions in which the wife disposes of or charges her separate property, and protect from undue influence or the fraud or compulsion of her husband and others; but such fraud etc. must be averred by the wife, and be sustained by proof".

Our statutes have now provided a special mode for the conveyance of the wife's separate property. This is a privy examination apart from her husband, and unless this is done, the wife has no power to charge her separate estate, except for necessities

1. Cartwright v. Hollis, 5 T. 152.

for herself and family, and for expenses incurred for the benefit of her separate property.

The separate property of the wife is liable for her debts contracted before marriage#, and it seems it is also liable to respond in damages for the frauds in which she participates in relation to her own property, and which inures to her exclusive benefit#. Some cases make a distinction by exempting the separate estate of the wife from liability because credit is given to the husband and not to the wife. This, however, is entitled to no credit, and is of no weight.

The wife's separate estate can only be made liable for improvements thereon when authorized by her. That is, the debt must be contracted by the wife herself or by her authority#.

When a judgement is rendered on a debt of the wife, it may direct the execution to be levied on the community property, or her separate property, at the option of the plaintiff#.

The law creates a presumption that all property holden by husband or wife is community property, but this presumption as

1. Callahan v. Patterson, 4 T. 61.
2. Howard v. North, 5 T. 289.
3. Warren v. Smith, 44 T. 245.
4. Grant v. Whittlesey, 42 T. 320.

between themselves and those claiming under them with notice, may be rebutted by proof that the purchase was made with the separate funds of either party.

The rights by which the husband and wife hold their property respectively, are perfectly equal, and there is no more ground for the admission of the unauthorized declarations of the husband to the wife's detriment than for the admission of those of the latter to the injury of the former. "The admission of the declaration of the husband", says the court in *McKay v. Treadwell* 8 T. 176, "in prejudice of the rights of the wife to her separate property would contravene the spirit and object of the constitution and laws by which her separate rights are guaranteed, unless they be made in case where he is constituted by law her virtual agent, or where authority from her may be inferred".

A husband may make a gift or grant of the community or his separate property to his wife by conveyance directly to her and if a deed be given by the husband to the wife, purporting to be for a valuable consideration, if it is given without fraud, and there is virtually no consideration, it will be upheld as a donation or gift[#].

If real property be purchased in part with the community

1. *Story v. Marshall*, 24 T. 306.

funds of husband and wife, and in part with the wife's separate funds, the wife becomes a tenant in common of the land with her husband, her interest being proportionate to her investment⁴.

So far as the law may have placed the separate property of the wife in her husband's control, she has a tacit mortgage. She virtually has a mortgage upon the community property to the extent of her separate estate.

(A). EARNINGS OF THE WIFE'S SEPARATE ESTATE.

It was at one time a very doubtful proposition whether crops grown upon the lands of the wife, by the labor of her slaves (before the war), or now by labor hired by herself, are the common property of the husband and wife, and subject to an execution upon a judgement against the husband.

The idea that such crops belonged to the wife as her separate property, was based upon the etymological sense of the phrase "increase of land" used in the Act of 1848, "better defining the marital rights".

This view of the case, however, was never adopted for

1. Bullis v. Noyes, 11 S.W.
Claibourne v. Tanner, 18 T. 68.

such an interpretation of the statute would have led to results "inequitable and unreasonable and wholly inconsistent with the recognized principles of law upon which the system of community property is based--that whatever is acquired by the joint efforts of the husband and wife shall be their community property."

"It is true," remarks Judge Bell in *DeBlanc v. Lynch* 23 T 25, "in a particular case, satisfactory proof might be made that the wife contributed nothing to the acquisitions; or on the other hand that the property was wholly acquired by her industry; but, from the very nature of the marriage relation, the law cannot permit inquiries into such matters. It conclusively presumes that whatever is acquired, except by gift, devise, or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry."

Thus it was held in the case of *White v. Lynch* 26 T 196 that, lumber sawed at the mill which was the separate property of the wife, by the labor of slaves also her separate property, and out of timber procured from land which likewise was her separate property is nevertheless the property of the community, and not the separate property of the wife.

In *Claflin v. Pfeifer* 11 S W 483 (Tex) the court held as a fundamental proposition that profits on investments of a wife's

separate estate are community property and liable for the husband's debts. Therefore if the profits should in any manner become mixed with the wife's separate estate, in a contest between the wife and the husband's creditor, the burden is on the wife to show how much of it retained the character of separate estate, or if any part of it has undergone mutations to trace and identify it.[#]

The wife's earnings unless given her by her husband, and likewise property bought with such earnings, belong to the community,[#] and a very interesting case reported in 72 T 359 (Dixon v. Sanderson), holds that money, received as a prize on a lottery ticket purchased with the separate property of the wife, is community property, not being acquired by either husband or wife by gift, devise or descent.

7. HOW SUIT BROUGHT FOR BENEFIT OF WIFE.

At common law, as the wife had no separate legal existence, suits in relation to her rights had to be brought in the joint names of husband and wife. The husband however could sue alone for such property of the wife, as he could dispose of for his own use.

If a suit had to be brought in equity in order to recov-

1. See also Jones v. Epperson 65 T 425.
2. Fisk v. Flores 43 T 340; Johnson v. Buford 39 T 242.

er the wife's property, although when recovered it might vest in the husband, yet the wife must be joined so that she may elect that the property shall go to her husband, or in order that the court may make a provision for her.

If the suit is brought in regard to the wife's separate estate, she alone has the right to bring the action and suit is brought in the name of her *prochein ami*.

Our system of jurisprudence recognizes none of the preceding distinctions. The wife's right to her own property, under our laws, cannot be affected in the slightest by the circumstance of the joinder of the husband for its recovery. In the words of Ch. J. Hemphill in *Cannon v. Hemphill* 7 T 184, "let it be recovered by whom and how it may, it remains unchanged the absolute property of the wife."

By Sec. 9 Act 1840 (Art 2415 Civ. Stats of Tex), it is declared that the husband may sue, either alone or jointly with his wife, for the recovery of any effects of the wife. The law thus gives him an option in the manner of bringing the suit. The husband in this particular is the authorized agent or attorney of his wife, and all his acts are binding on his principal, if done in good faith. If the husband is incompetent or negligent in taking care of her rights, the court will doubtless interfere for her protection.

She also may impeach any decree obtained by the husband, while acting in this capacity, through fraud or collusion, and if she does so the husband should be made defendant and not a co-plaintiff with his wife.

8. WIFE AS A MERCHANT.

The wife may become a merchant but she must conduct the business with her separate property, and she can under no circumstances invest the community estate or buy goods on the credit of the husband. She virtually cannot purchase on credit but must buy for cash only and she must at all times be ready to show that the money used in her business belongs to her separate means.

When a woman marries all business partnerships which existed between herself and another prior to that time are at once dissolved for after marriage she can form no partnership for the transaction of business, which the law can recognize, either with her husband or the former partner. #

9. PUTATIVE MARRIAGES.

A marriage duly solemnized in Texas while subject to the laws of Mexico, though the husband might have had a former wife

living imposed upon the second wife, if ignorant of this fact, all the obligations and invested her with all the rights of a lawful wife, so long as this ignorance continued.

"According to the system of Spanish jurisprudence," says the learned judge in *Smith v. Smith* 1 T 621, "a putative is converted into a real marriage by the removal of the disability, however that may be effected. Under that system of laws a marriage contracted in good faith by both or one of the parties, and afterwards annulled on account of some existing impediment, produces nevertheless the civil effects of true matrimony in favor of the innocent spouse, as well as the offspring of such marriage."

In the case of *Babb v. Carroll* 21 T 765, where a man and woman emigrated to Texas in 1835, and from that time to the death of the man in 1837, lived and cohabited together and passed themselves, and were reported as husband and wife, the court held, that lands acquired by the husband as a colonist, are community property between them to the exclusion of a wife elsewhere.

Under a statute in force in Texas in 1837 the surviving husband or wife could not inherit as heir of the deceased but if the widow had not sufficient means to live with the comforts to which she was accustomed, she was entitled to what was termed the marital fourth of the estate of the deceased husband. Upon marrying again, however, she forfeited this right.

If married persons should move from a state or foreign country into a state where the community system exists, their subsequently acquired property is subject to the community of acquêts and gains.¹ Some jurists in France and Holland doubt the correctness of the above proposition, and hold that the community system prevails and follows the property even subsequently acquired after a change of domicile, on the ground of a tacit or implied contract having the effect of an actual marriage settlement. Such reasoning however has for its basis the comity of nations and this always yields to the authority of positive legislation.

10. DESCENT OF COMMUNITY PROPERTY.

Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor, if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased, or descendants of such child or children, then the survivor shall be entitled to one-half ($1/2$) of said property, and the other half shall pass to

1. Gale v. Davis 4 Martin's Rep. 645 (La);
Saul v. His Creditors 17 Martin's Rep. 669 (La).

such child or children or their descendants. But such descendants shall inherit only such portion of said property, as the parent through whom they inherit would be entitled to if alive. #

The term child or children in the above article has been held to refer only to descendants in the first degree. Therefore if a husband or wife dies leaving grandchildren but no children, the entire community estate passes to the surviving spouse. #

A surviving husband is entitled to a life estate in one-third ($1/3$) of lands which were the separate property of his deceased wife, which corresponds to the husband's curtesy at common law. This life estate, however, never attached to the deceased wife's moiety of the community lands.

In every case the community estate passes charged with the debts against it, (Art 1654 Stats.), and the survivor may make application to the county court to have partition of the estate whereupon the same rules and regulations apply as in partition and distribution of other estates. #

On the death of the husband or wife the survivor may pay

1. Art. 1653 Sayle's Civ. Stats. Texas.
2. Burgess v. Hargrove 64 T 110;
Cartwright v. Moore 66 T 55.
3. Art. 2132 Stats.

community debts and for that purpose may sell the entire community property including the homestead and other exempt property. He has the entire management and control of the community estate, and if he pays the debts of such estate with his separate means, he may reimburse himself by an appropriation of community property.

"The survivor", says Judge Robertson, "becomes a tenant in common with the heirs of the decedent, of the community property, and is not responsible to them for its use or hire so long as he does no act preventing the other tenants in common from like occupation and use."

He is virtually a trustee but unlike other trustees, while the object to be accomplished by him is prescribed by law yet the means of attaining it are not specified. He also cannot be required to account for he is vested with complete power and discretion in the administration of the estate.

The survivor is entitled of his own right to one half ($1/2$) of the estate, and when he qualifies under the statute he virtually becomes the managing partner of the entire estate. "Whether he has done well or ill", says the learned judge in *Leatherwood v. Arnold* 66 T. 414, "depends not on any particular act, but on the general result. He is debited with the value of the estate and its revenues, and credited with disbursements,

and must account to creditors and distributees for the remainder.⁴ The right to the entire control of the estate by the survivor may be terminated at any time by the grant of administration thereon, or by proceedings for partition and distribution.

The creditor may have his suit and judgment against the survivor and execution against the community property under such judgment. He need never proceed in equity or require an accounting, and whatever remedy he selects his right to have his charge upon the trust estate satisfied, remains the same.

Where the husband or wife dies intestate, leaving no child or children and no separate property, the community property passes to the survivor charged with the debts of the community, and no administration thereon is required.

Where the wife dies leaving a surviving husband and a child or children, the surviving husband shall have the exclusive management, control and disposition of the community property after her death, in the same manner as during her lifetime. This right, however, is subject to certain statutory provisions.

The surviving husband, must within four years after the death of his wife, when there is a child or children, file a written application in the county court of the proper county stating:-

- (1) The death of his wife and the time and place of her death.
- (2) That she left a child or children surviving her, giving the name, residence and age of each child.
- (3) That there is a community estate between his deceased wife and himself.
- (4) Such facts as show the jurisdiction of the court over the estate.
- (5) Asking for the appointment of appraisers to appraise each estate.

When such written application is made the court appoints appraisers, who, with the surviving husband make out an inventory of said community estate, and attach thereto all community debts, said inventory being returnable to the court in twenty (20) days. The surviving husband must also qualify with a bond with two sureties equal to the whole value of the community estate.

The court then examines the inventory, bond, etc. and approves or disapproves them by an order. When a favorable order is received by the court the survivor has control of the property as a trustee and not as an administrator. He acts independently of the orders of the Probate court, and the exercise of his discretion is under no judicial warrant or control

as in cases of ordinary administration.

The survivor must keep a fair and full account of his management of the community estate, and it is his duty to pay all debts according to the classification and in the order prescribed for the payment of the debts in other administrations.

The surviving wife may retain the exclusive management, control and disposition of the community property of herself and her deceased husband in the same manner and subject to the same rights, rules and regulations as provided in the case of a surviving husband, until she may marry again. Upon the marriage of the surviving wife she shall cease to have such control and management of said estate, or the right to dispose of the same, and said estate shall be subject to administration as in other cases of deceased person's estates.

After a lapse of twelve months from the filing of the bond by the survivor, the persons entitled to the deceased's share of such community estate, or any portion thereof, shall be entitled to demand and have a partition and distribution thereof in the same manner as in other administrations#.

The homestead rights of the widow and children of deceased are the same whether the homestead be the separate property

of the deceased or community property between the widow and the deceased, and the respective interests of such widow and children shall be the same in the one case as in the other. (Art. 2006, Civ. Stats. Tex.)

11

A LEADING QUESTION.

Suppose land which is community property is conveyed by the husband at the death of his wife, to an innocent third party. Are the children of the deceased wife entitled to recover their share of the property even from the innocent third party, and if so what must such a bona fide holder show in order to throw the burden of proof on the heirs in impeaching the conveyance?

The court in the prevailing opinion in Yancy v. Batte 48 T. 46 holds; if the land is proved to be community property, the children of the deceased wife are entitled to recover unless some equitable defense was made. In the case of Johnson v. Harrison 48 T. 257 the same judge writing the prevailing opinion as in the preceding case, lays down the doctrine that, the existence of a community obligation being shown the burden of proof, in impeaching the conveyance made in discharge of that obligation is properly placed on the heir. But the implied

conclusion is that until such community obligation or some other equity is established, the right of the heir prevails.

What then are the equitable defenses which the holder of the property must establish? These have been held to be as follows: (1) That there were debts against the community estate of such vendor and his former wife, when he sold the land. (2). That such sale was made with the honest purpose of paying such debts, and that the vendor had justly accounted to his deceased wife's children for all their interest in the community estate.

Justice Moore in a very learned opinion in the case of Yancy v. Ratte, dissents from the holding of the court. His objections, briefly summarized are as follows:

(1) The legal title being in the husband he passes by deed the legal title to the purchaser, and the burden of proof is upon the heirs to show that the vendee is not an innocent purchaser.

(2) If the purchaser shows that he is a holder for value from the party apparently holding the legal title, and that party has authority to sell, if the purchaser has no notice of the rights of the heirs of the wife, his equity is superior to that of the heirs, and they are not entitled to a recovery.

(3) Such a decision, "can but be a fountain of fraud and perjury, poisoning the minds of children, inculcating lessons of selfish distrust and disrespect in place of reverence, filial affection and domestic harmony", and furthermore it will cast a cloud upon almost every title to land in the State.

(4) Attorneys, under such a decision, cannot with even very diligent inquiry and examination, say that a title is unquestionably perfect, and therefore they cannot advise a client that he may purchase without danger.

As to the question of equitable defenses, Judge Moore remarks: "A purchaser cannot possibly know what debts exist against the community. The only source to which he could apply for information is the husband himself. Now it is well settled that where a trustee has authority to sell for the payment of debts generally an innocent purchaser is not to suffer through abuse of his trust, by selling when it is unnecessary; nor though he makes an improper appropriation of the purchase money."

The law on the subject of the rights of the surviving husband in the community property is doubtless at variance with the habits and modes of thought of the large body of the people of the state. But in the words of Judge Gould, "the doctrine" as laid down in the prevailing opinion, "has been recognized from so early a period, and in so many cases, that we do not

regard it as open to controversy".

There is no rule more vital, more fundamental, than that which requires adherence to decisions. The disregard of that rule, especially in matters affecting titles to land leads to most injurious results, and can only be justified by "reasons most urgent and upon a clear manifestation of error". (Kent Comm. 4/5). Therefore if the error be in the law, the proper remedy is only to be sought in legislative action.

CONCLUSION.

I have placed before you the essentials of what is known as the Community System. It is midway between the common law and the civil law, and possesses many of the merits of each.

The great defect in the system, as it appears to me is, that the husband has absolute control of the wife's property. He may during his management place it in such a condition that it will be almost impossible to trace it through its different mutations, and show conclusively that it is the separate property of the wife.

The wife, however, may have her separate property registered. This appears to me to be the only remedy. If the law should compel the wife at or before marriage, and subse-

quently when she acquires separate property to register it, the great evil arising through the husband's innocent or fraudulent mismanagement will have been obviated.

As a whole, the system embraces the true ideas of conjugal relationship. It makes husband and wife absolute co-equals and allows them to share as equal partners in the profits and gains of their married life.

Charles Finkel

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